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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Yamaha Corporation

Serial No. 76445495

Evan A. Raynes of Finnegan, Henderson, Farabow, Garrett & Dunner, L.L.P. for Yamaha Corporation.

William T. Verhosek, Trademark Examining Attorney, Law Office 114 (K. Margaret Le, Managing Attorney).

Before Simms, Hanak and Hohein, Administrative Trademark Judges.

Opinion by Simms, Administrative Trademark Judge:

Yamaha Corporation (applicant), a Japanese corporation, has appealed from the final refusal of the Trademark Examining Attorney to register the mark FLYING DRAGON for musical instruments, namely, drums and percussion instruments, and foot pedals for drums and

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percussion instruments.¹ The Examining Attorney has refused registration under Section 2(d) of the Act, 15 USC §1052(d), on the basis of two registrations held by the same entity: Registration No. 1,975,653, issued May 28, 1996, Sections 8 and 15 declaration accepted and acknowledged, respectively, for the mark DRAGON for pick-ups for electric guitars; musical instruments, namely, guitars; and Registration No. 2,422,033, issued January 16, 2001, for the mark DRAGON 2000 for guitars. Applicant and the Examining Attorney have submitted briefs but no oral hearing was requested.

It is the Examining Attorney's position that applicant's mark FLYING DRAGON is very similar in overall commercial impression to registrant's marks DRAGON and DRAGON 2000, and that these marks are all used on related musical instruments such that confusion is likely. More particularly, the Examining Attorney argues that the word DRAGON is the dominant term in all three marks and creates the commercial impression of a single source of ownership. In this regard, the Examining Attorney contends that the word "FLYING" in applicant's mark is less significant in creating a commercial impression because it is a

¹ Serial No. 76445495, filed August 27, 2002, based upon applicant's allegation of a bona fide intention to use the mark in commerce.

characteristic of dragons. The Examining Attorney has made of record a dictionary definition of the word "dragon" as "1. A mythical monster traditionally represented as a gigantic reptile having a lion's claws, the tail of serpent, wings, and a scaly skin... 3. Any of various lizards, such as the Komodo dragon or the flying lizard."² The Examining Attorney argues, therefore, that applicant's mark and registrant's marks create similar commercial impressions of a mythical creature because the term "FLYING" describes an attribute of dragons. Further, it is the Examining Attorney's position that registrant's marks DRAGON and DRAGON 2000 are strong and arbitrary ones for musical instruments and parts thereof.

With respect to the goods, relying upon numerous third-party registrations, the Examining Attorney maintains that applicant's drums and percussion instruments and registrant's guitars are closely related musical instruments, may be produced by the same entity and are sold in the same channels of trade--music stores--to the same class of purchasers, professional and amateur musicians.

² *The American Heritage Dictionary of the English Language, Third Edition* (1992).

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In this regard, the Examining Attorney has made of record over 20 use-based registrations of marks registered for both guitars and drums, as well as, in many cases, other musical instruments. For example, the mark ARTSTAR is registered for drums and guitars (Registration No. 2,498,381, issued October 16, 2001); the mark MAHALO is registered for drums, guitars, guitar picks, percussion instruments as well as other instruments (Registration No. 2,563,150, issued April 23, 2002); the mark LEGION is registered for drums and guitars as well as other instruments (Registration No. 2,606,059, issued August 6, 2002); ORBITONE and design is registered for drums, percussion instruments, guitars and other instruments (Registration No. 2,687,385, issued February 11, 2003); and the mark SAMICK and design is registered for drums and guitars and other musical instruments (Registration No. 1,686,332, issued May 12, 1992). Another registration of record is for the mark YAMAHA for the following goods: pianos, reed and pipe organs, electronic organs, accordions, saxophones, clarinets, bugles, trumpets, cornets, trombones, French horns, oboes, flutes, piccolos, tubas, violins, harps, cellos, guitars, ukuleles, mandolins, banjos, drums, cymbals, triangles, harmonicas, xylophones, metronomes, and all parts and accessories

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therefore (Registration No. 678,446, issued May 12, 1959, twice renewed).

The Examining Attorney has also made of record excerpts from the Nexis computer database indicating that the same company may make, distribute or sell both drums and guitars. For example, the following are illustrative:

Musicians will want to check out Guitar Center Cincinnati, located on the mall's east end. The store sells electric and acoustic guitars, keyboards and drums, amplifiers, instructional materials, DJ equipment, lighting, live sound and other accessories...
Dayton Daily News, June 7, 2003

...The investment was used to offer financing to Charleston, S.C.-based MBT for its purchase of Midwest Musical Instrument Inc., a Effingham, Ill., distributor of guitars, drums and electronic music equipment...
Daily Deal (New York, N.Y.) May 7, 2003

This year's honorees will include entertainer James Brown..., Savannah guitar and drum manufacturers Fred and Dinah Gretsch...
The Atlanta Journal and Constitution, April 18, 2003

He opened about 50 stores from Florida to California in five years, selling guitars, drums, amps, electric keyboards and DJ equipment...
Miami Herald, September 28, 2002

Applicant, on the other hand, maintains that confusion is unlikely because of the differences in the marks, the weakness of the term "DRAGON" in the music field, the differences in channels of trade, the sophistication of the

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consumers of the respective goods and the care they are likely to exercise in making their purchasing decisions.

More specifically, applicant points to the fact that applicant's mark begins with the word "FLYING," and that it is often the first word in a mark that is most likely to be impressed upon the mind of a purchaser. With respect to the weakness of the registered marks, applicant has made of record 15 third-party registrations and applications which contain the word "DRAGON," and numerous material from the Internet concerning other uses of the word "DRAGON" as part of various marks. The registered marks include DRAGONFLY for electric guitars (Registration No. 2,353,915, issued May 30, 2000); DRAGONWHISPERS for harps and accessories therefor, namely, hardware, shells, sound boards, strings and string sets, necks and columns (Registration No. 2,085,537, issued August 5, 1997); DRAGON for audio tape recorders and for CD players (Registration No. 1,324,188, issued March 12, 1985, and Registration No. 2,492,821, issued September 25, 2001, both owned by the same entity); RUSSIAN DRAGON for electronic device for monitoring how closely a musician is playing along with the metronome (Registration No. 2,620,829, issued September 17, 2002); DRAGONFLOWER for sheet music and books, among other goods and services (Registration No. 2,514,642, issued December

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4, 2001); DRAGONS for CDs and audiotapes as well as performances by a musical group (Registration No. 2,593,872, issued July 16, 2002); DRAGONHEART for audio and videotape (Registration No. 2,461,931, issued June 19, 2001); DRAGONLORD for live performances by a musical group (Registration No. 2,592,694, issued July 9, 2002); and DRAGONEYESEVEN for live musical group performances (Registration No. 2,603,547, issued August 6, 2002).

Applicant has also made of record information from the Internet about the availability of a dulcimer offered under the mark DRAGON, guitars offered under the mark DRAGONFLY, and a publishing company under the name of "Dragon Music Publishing." Other Internet evidence shows a number of bands with the word "Dragon" in their names, such as The Dragon Band, The Round Rock Dragon Band, The Russian Dragon Band, The Blue Dragon Band, The Marching Dragon Band, The Celtic Dragon Pipe Band, The 2 Headed Dragon Band, The Holy Dragons Band, Here Be Dragons Band, etc. It is applicant's position, therefore, that the term "DRAGON" is weak in the music field and does not indicate a single source of ownership, but many sources, and that purchasers have been conditioned to expect that these various goods and services come from different sources. Applicant also argues that

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the Examining Attorney has "ignored" one portion of its mark, the word "FLYING."

Concerning the channels of trade, applicant has made of record evidence showing that registrant has only manufactured about 300 of the guitars in question, and that only four were for sale when applicant filed its request for reconsideration. According to applicant, consumers could purchase both applicant's and registrant's goods at only one store. Therefore, applicant maintains that there is virtually no overlap in the channels of trade for applicant's and registrant's goods. Also, registrant's goods, according to information from the Internet, may cost between \$11,000 and \$40,000 due to their high quality and limited numbers. Applicant's goods on the other hand, cost only up to \$350. Because of the high cost of registrant's guitars, purchasers are likely to be very sophisticated and extremely careful in purchasing them, according to applicant. Accordingly, applicant contends that the Examining Attorney has failed to consider the realities of the marketplace and the actual channels of trade of the respective goods. Applicant also argues that the third-party registrations, introduced by the Examining Attorney, showing that both drums and guitars may be offered under the same mark by the same source are of limited probative

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value in the face of applicant's evidence showing differing actual channels of trade.

With respect to the so-called weakness of the cited registered marks, the Examining Attorney maintains that only three registrations are in the same or similar field of goods: DRAGONWHISPERS for harps and accessories therefor, DRAGONFLY for electric guitars, and DRAGONFLOWER for sheet music. The Examining Attorney maintains that these marks have different connotations and create different commercial impressions, and that a "dragonfly" is an insect and not a mythical animal. As to the article mentioning DRAGON dulcimers, it is the Examining Attorney's position that such an instrument ("[a]n instrument with wire strings of graduated lengths stretched over a sound box, played by striking with two padded hammers or by plucking") is not normally offered or sold in the same channels of trade as applicant's and registrant's musical instruments. The Examining Attorney argues that while the mark DRAGON "may be considered weak for a variety of musical goods and services... registrant's mark is not precluded protection where the goods are considered to be in the same field, namely musical instruments." Examining Attorney's appeal brief, unnumbered pages 7-8.

Our determination of likelihood of confusion under Section 2(d) of the Act is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. See *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003); and *In re E.I. du Pont de Nemours and Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). Two key considerations are the marks and the goods or services. *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) ("The fundamental inquiry mandated by [Section] 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.").

Turning first to a consideration of the respective goods, it is well settled that the registrability of applicant's mark must be determined on the basis of the identification of goods as set forth in the involved application and the identification of the goods in the cited registrations. See *Octocom Systems Inc. v. Houston Computer Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1990) and *Canadian Imperial Bank of Commerce, N.A. v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987). Also, it is settled that, absent any specific limitations in applicant's or registrant's identifications

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of goods, the issue of likelihood of confusion must be determined by looking at all the usual or normal channels of trade for the respective goods. See *CBS Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198 (Fed. Cir. 1983); and *Squirtco v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 940 (Fed. Cir. 1983) ("There is no specific limitation and nothing in the inherent nature of Squirtco's mark or goods that restricts the usage of SQUIRT for balloons to promotion of soft drinks. The Board, thus, improperly read limitations into the registration"). See also *Schieffelin & Co. v. Molson Companies Ltd.*, 9 USPQ2d 2069, 2073 (TTAB 1989) ("[M]oreover, since there are no restrictions with respect to channels of trade in either applicant's application or opposer's registrations, we must assume that the respective products travel in all normal channels of trade for those alcoholic beverages"); and *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981).

Here, there are no restrictions in the identification of goods in registrant's registrations and it would be improper to read limitations into that identification of goods. The respective goods, as identified, are drums and percussion instruments (which may include, aside from drums, such instruments as chimes, cymbals, triangles, gongs, xylophones, tambourines and castanets) and guitars.

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These goods are, of course, different musical instruments. However, as our primary reviewing Court stated in the case of *Hewlett-Packard Company v. Packard Press, Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002): "Even if the goods and services in question are not identical, the consuming public may perceive them as related enough to cause confusion about the source or origin of the goods and services."

Applicant's drums and percussion instruments and registrant's guitars are all musical instruments which are likely to be sold in the same types of stores--music stores, or perhaps music departments of large department stores. These goods are sold to members of the general public and to professional musicians. And the evidence of record suggests that these types of goods may emanate from the same manufacturer. For example, the third-party registrations suggest that the same source may offer drums and guitars under the same mark. See *In re Infinity Broadcasting Corp. of Dallas*, 60 USPQ2d 1214, 1218 (TTAB 2001); and *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993). Indeed, one of the numerous third-party registrations of record shows that applicant itself has registered the mark YAMAHA for a variety of musical instruments including guitars and drums as well as other

percussion instruments. And the Nexis evidence further indicates that there are common manufacturers of drums and guitars.

It is true, as applicant argues, that these goods may be somewhat expensive and may be purchased with some degree of care. However, in view of the way in which we must consider these goods (as identified, and not as the very expensive guitars that registrant may actually sell), these goods may include instruments of varying prices and qualities, and are purchased by members of the general public.

Turning next to the marks, although they must be compared in their entirety, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark. See *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985) ("On the other hand, in articulating reasons for reaching a conclusion on the issue of likelihood of confusion, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on consideration of the *marks in their entirety*."). We agree with the Examining Attorney that each mark is dominated by the word "DRAGON." Any

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differences in sound, appearance and connotation of applicant's and registrant's marks can be attributed to the word "FLYING" in applicant's mark. However, it is our opinion that this difference is not sufficient to avoid the likelihood of confusion.

Moreover, the third-party registrations do not show any "weakness" of the mark DRAGON for musical instruments. The third-party registrations referred to by applicant are not evidence of use of those marks in the marketplace, and they do not show that the public is familiar with those marks. See *AMF Inc. v. American Leisure Products, Inc.*, 474 F.2d 1403, 177 USPQ 268, 269 (CCPA 1973) ("The existence of [third party] registrations is not evidence of what happens in the market place or that customers are familiar with them..."). There is no evidence, for example, relating to the nature and extent of the use of these marks. Moreover, while third-party registrations may be looked at in the same manner as a dictionary to determine a term's significance in a particular trade, it is not seen how the registrations containing this word shed any light on this significance. The mark DRAGON appears to be an arbitrary mark for musical instruments.

Furthermore, these third-party registrations cover marks with different meanings and commercial impressions

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(DRAGONWHISPERS, DRAGONFLY, DRAGONLORD, DRAGONFLOWER, DRAGONHEART) and/or are for different goods and services (entertainment services in the nature of a musical group, sheet music, audio and videotape, CD players and audio tape players, etc.). The single use of DRAGON for dulcimers, from the Internet, which may not be a widely available or common musical instrument, does not detract from the arbitrary nature of this mark for musical instruments, and does not mean that the mark DRAGON is a weak one for musical instruments.³ In sum, we do not believe that the registered mark DRAGON has been shown to be weak.

Finally, any doubt with respect to the issue of likelihood of confusion must be resolved in favor of the prior user and registrant. See *In re Hyper Shoppes (Ohio) Inc.*, 837 F.2d 840, 6 USPQ2d 1025, 1026 (Fed. Cir. 1988); and *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984). Applicant had an almost unlimited number of marks to choose from but chose a mark too similar to a registered mark for closely related musical instruments.

³ The record also includes an Internet Web page showing the availability of a DRAGON guitar strap. However, the Examining Attorney states that it is not clear that this product is not one of registrant's products.

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We conclude, therefore, that a purchaser familiar with DRAGON and DRAGON 2000 guitars who then encounters FLYING DRAGON drums and percussion instruments, perhaps in the same store, is likely, we believe, to think that these musical instruments all come from the same source. That is to say, the average purchaser of a FLYING DRAGON drum or percussion instrument is likely to believe that these goods come from the same entity that made or sponsored the DRAGON and DRAGON 2000 guitars.

Decision: The refusal of registration is affirmed.